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EUROPEES HOF VOR DE RECHTEN VAN DE

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Art. 6 EVRM

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Rechten van verdediging. Bosphorus-presumptie. Erkenning en tenuitvoerlegging buitenlands vonnis niet in strijd met art. 6 EVRM.

Klager is een Letse beleggingsadviseur. In 1999 leent hij een bedrag van 100.000 dollar van het in Cyprus gevestigde bedrijf F.H. Ltd, waarbij wordt overeengekomen dat hij het bedrag, met rente, voor eind juni 1999 zal terugbetalen. Bij notariële akte wordt bepaald dat het Cypriotische recht van toepassing is op de leenovereenkomst en dat de Cypriotische rechter bevoegd is. In 2003 stelt F.H. een procedure tot terugbetaling in bij de Cypriotische rechter. Een dagvaarding wordt aangetekend verzonden naar het in de akte genoemde adres van klager in Riga, die verstek laat gaan. In 2004 wijst de rechtbank de vordering van F.H. toe en legt klager een terugbetalingsverplichting op. In 2005 verzoekt F.H. de Letse rechter het Cypriotische vonnis ten uitvoer te leggen. De Letse rechtbank honoreert dit verzoek in 2006 buiten aanwezigheid van de partijen. Volgens klager had de Letse rechtbank het Cypriotische vonnis echter niet ten uitvoer mogen leggen, aangezien de procedure in Cyprus in allerlei opzichten tekort geschoten was. Hij besluit het Cypriotische vonnis uit 2004 niet aan te vechten, maar gaat wel in beroep tegen het vonnis van de Letse rechtbank. In deze procedure gaat de Letse Hoge Raad uiteindelijk over tot erkenning en tenuitvoerlegging van het Cypriotische vonnis uit 2004. De Hoge Raad merkt daarbij op dat klager dat vonnis niet tijdig heeft aangevochten bij de Cypriotische rechter en dat de Brussel I-verordening geen ruimte laat voor een inhoudelijke beoordeling van het buitenlandse vonnis.

In 2007 dient klager een klacht in tegen Cyprus en Letland bij het EHRM. Cyprus zou aansprakelijk zijn voor een schending van art. 6 EVRM, omdat de Cypriotische rechter had nagelaten hem op correcte wijze op te roepen en hem niet in de gelegenheid had gesteld zijn rechten van verdediging adequaat uit te oefenen. Ook Letland zou aansprakelijk zijn voor een schending van artikel 6 EVRM, omdat de Letse rechter uitvoering heeft gegeven aan het gebrekkige Cypriotische vonnis.

De klacht tegen Cyprus wordt in 2010 niet-ontger verzoekt vervolgens om verwijzing van de zaak naar de Grote Kamer.

Het Hof stelt voorop dat het niet bevoegd is het Unierecht, waaronder de Brussel I-verordening, te interpreteren of toe te passen — dat is de taak van het Hof van Justitie van de Europese Unie en van de nationale rechters.

Het Hof overweegt vervolgens dat de zogenaamde Bosphorus-lijn geldt bij de nationale toepassing van het Unierecht: indien (1) de lidstaten zelf geen beoordelingsvrijheid hebben, en (2) het toezichtmechanisme waarin het Unierecht voorziet ten volle is ingezet, dan mag men ervan uitgaan dat fundamentele rechten een gelijkwaardige bescherming genieten in de EU-rechtsorde.

Aan de eerste voorwaarde is volgens het Hof in het onderhavige geval voldaan, nu art. 34 lid 2 van de Brussel I-verordening de Letse rechter geen keuze liet: hij moest het Cypriotische vonnis ten uitvoer leggen. Het is waar dat art. 34 lid 1 van de verordening de mogelijkheid openlaat om tenuitvoerlegging te weigeren indien erkenning van het buitenlandse vonnis duidelijk in strijd komt met eisen van openbare orde. Klager heeft zich voor de Letse rechter echter niet op deze bepaling beroepen, en het Hof acht het niet zijn taak om eigener beweging na te gaan of deze dan wel andere bepalingen van de verordening misschien van toepassing waren.

Wat betreft de tweede voorwaarde hecht het Hof er niet veel waarde aan dat de Letse rechter geen prejudiciële vraag heeft gesteld aan het Europese Hof van Justitie. Daartoe zal in veel gevallen geen aanleiding zijn, en klager had er ook niet om verzocht.

De Bosphorus-presumptie is dus van toepassing. Vervolgens gaat het Hof na of deze presumptie in dit concrete geval wordt weerlegd doordat de gang van zaken heeft geresulteerd in een klaarblijkelijke miskenning van de door het EVRM beschermde rechten.

In het onderhavige geval had klager zich verzet tegen tenuitvoerlegging van het Cypriotische vonnis, omdat de procedure in Cyprus in allerlei opzichten tekort zou zijn geschoten. De Letse Hoge Raad heeft die klacht afgedaan met de overweging dat klager dat vonnis niet had aangevochten bij de Cypriotische rechter. Volgens het Hof had de Letse Hoge Raad echter zelf moeten controleren of klager het vonnis had kunnen aanvechten in Cyprus. Dat de Letse rechter dit heeft nagelaten, is betreurenswaardig, maar het Hof hecht hieraan geen doorslaggevend belang. De Cypriotische regering heeft namelijk desgevraagd te kennen gegeven — en dat is

door partijen ook niet betwist — dat er wel degelijk een rechtsgang voor klager had opengestaan. Klager had zich daarvan op de hoogte kunnen stellen, temeer daar hij willens en wetens een overeenkomst was aangegaan waarop Cypriotisch recht van toepassing was. Door het er maar bij te laten zitten heeft hij zelf bijgedragen aan het ontstaan van de situatie waarover hij nu klaagt.

Het Hof concludeert dat art. 6 EVRM niet is geschonden.

Avotiņš,
tegen
Letland

The law

Alleged violation of Article 6 § 1 of the Convention

69. The applicant claimed to be the victim of a violation of Article 6 § 1 of the Convention. He complained that in issuing a declaration of enforceability in respect of the judgment of the Limassol District Court of 24 May 2004, which in his view was clearly defective as it had been given in breach of his defence rights, the Senate of the Latvian Supreme Court had infringed his right to a fair hearing. Article 6 § 1, in so far as relevant to the present case, provides:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair … hearing … by [a] … tribunal …"

A. Chamber judgment

70. In its judgment the Chamber began by observing that, since the complaint against Cyprus had been declared inadmissible as being out of time (see paragraph 4 above), the Court did not have jurisdiction to determine whether the Limassol District Court had complied with Article 6 § 1 of the Convention. The scope of the case was therefore confined to ascertaining whether, in ordering the enforcement of the Cypriot judgment in Latvia, the Latvian courts had observed the fundamental principles of a fair hearing within the meaning of that provision. In that connection the Chamber found that the observance by the State of its legal obligations arising out of membership of the European Union was a matter of general interest and that this also applied to the implementation of the Brussels I Regulation, based on the principle of 'mutual trust in the administration of justice'. The Latvian courts had therefore had a duty to ensure the recognition and rapid and effective enforcement of the Cypriot judgment in Latvia. The Chamber further observed that the protection of fundamental rights afforded by the European Union was in principle equivalent to that for which the Convention provided (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 160–65, ECHR 2005-VI).

71. The Chamber further considered that, having borrowed a sum of money from a Cypriot company and signed an acknowledgment of debt deed governed by Cypriot law and subject to the jurisdiction of the Cypriot courts, the applicant could have been expected to familiarise himself with the legal consequences of any failure on his part to repay the debt and with the manner in which any proceedings would be conducted in Cyprus. In the Chamber's view, the onus had been on the applicant to demonstrate that he had had no effective remedy in the Cypriot courts; however, he had not demonstrated this either before the Senate of the Latvian Supreme Court or before the Strasbourg Court. The Chamber therefore concluded that in dismissing the applicant's arguments simply by reference to the fact that he had not appealed against the Cypriot judgment, the Supreme Court had taken sufficient account of the rights protected by Article 6 § 1 of the Convention. There had therefore been no violation of that provision in the present case.

72. Lastly, the Chamber did not find any appearance of a violation with regard to the applicant's other allegations under Article 6 § 1.

B. The parties' submissions

1. The applicant

73. In his request for referral to the Grand Chamber and his oral pleadings at the hearing, the applicant put forward the following arguments. He submitted at the outset that the presumption of equivalent protection (the '*Bosphorus* presumption') was inapplicable in the present case for two reasons. Firstly, under the Brussels I Regulation the higher courts in Latvia (the Regional Court and the Senate of the Supreme Court) had not been obliged automatically to recognise the Cypriot judgment. On the contrary, Articles 34 and 35 of the Regulation had afforded them a broad margin of discretion to check that the applicant's fundamental procedural rights had been respected in the State of origin and to decide whether or not the judgment should be enforced in Latvia. To that extent, the Latvian courts had therefore retained full responsibility for ensuring compliance with the requirements of Article 6 § 1 of the Convention. Moreover, in declaring the judgment to be enforceable, the Senate of the Supreme Court had clearly breached the terms of Article 34(2) of the Regulation as interpreted by the CJEU. In that connection the applicant referred to the CJEU's judgment in the *Trade Agency* case (see paragraph 60 above) and to the sub-

sequent rulings of the Senate of the Latvian Supreme Court. In two cases, the latter had carefully examined whether the defendants had been duly and promptly summoned to appear before the courts in the State of origin. In both cases, the defendants had not attempted to appeal against the judgments in question and the Senate had not criticised them on that account.

74. Secondly, the present case was to be distinguished from the *Bosphorus* case in so far as, in this case, the Senate of the Supreme Court had failed in its duty to consider requesting a preliminary ruling from the CJEU. The applicant acknowledged that he had never requested that such a ruling be sought, but argued that he had had no opportunity to do so since only the other party had been allowed to make submissions on the merits of the case at the hearing of 31 January 2007. Hence, the Latvian courts had not made use of the review mechanisms existing in the European Union legal system. In the applicant's view, if the Latvian Supreme Court had requested a preliminary ruling from the CJEU, the latter would most likely have indicated that it was empowered to verify whether the applicant had been duly informed of the proceedings before the Cypriot court and whether it had been, or still was, open to him to appeal against the Cypriot judgment. The applicant referred in that connection to paragraph 38 of the *Trade Agency* judgment, cited at paragraph 60 above. In his view, the present case was therefore more akin to the case of *Michaud v. France* (no. 12323/11, § 112–115, ECHR 2012), in which the Court had found that the *Bosphorus* presumption did not apply, for several reasons including the one just cited.

75. The applicant acknowledged that the observance by the State of its legal obligations arising out of membership of the European Union was a matter of general interest. However, it would be erroneous and inconsistent with the Court's settled case-law to find, as the Chamber had done in its judgment, that this reason alone constituted a legitimate aim sufficient to justify restricting the rights guaranteed by the Convention. In the Court's case-law, that objective had never been regarded as sufficient justification for interference with fundamental rights unless it was accompanied by other legitimate aims such as the prevention of crime (the applicant referred to *Michaud*, cited above) or the protection of the rights of others (he referred to *Povse v. Austria* (dec.), no. 3890/11, 18 June 2013). In the applicant's submission, since the Brussels I Regulation had not required the Latvian authorities to enforce the Cypriot judgment automatically and unconditionally, the interference in question had not pursued any legitimate aim.

76. In the applicant's view, his situation was fundamentally different from that in the *Orams* case, which had been the subject of proceedings before both the CJEU (see paragraph 61 above) and the European Court of Human Rights (see *Orams v. Cyprus* (dec.), no. 27841/07, 10 June 2010). In that case, the applicants had been able to appeal against the impugned judgment. Their lawyer had been informed of the hearing before the Cypriot Supreme Court at which their appeal was to be examined and had actually appeared and pleaded his clients' case. In Strasbourg, the applicants had complained only of the lack of written notice and the Court had found that the guarantees of Article 6 § 1 did not extend to requiring written notice to be given. In the present case, by contrast, the applicant had never been served with the document instituting the proceedings.

77. The applicant further submitted that, having repaid his contractual debt of his own free will, he could not have expected that proceedings would be brought against him in Cyprus. The Senate of the Latvian Supreme Court should have satisfied itself that the possibility of appealing against the impugned judgment in Cyprus existed in law and in fact, instead of placing the entire burden of proof on the applicant. In his submission, he should not be criticised for not attempting to appeal against the Cypriot judgment, for three reasons. Firstly, the judgment itself had contained no reference to the available judicial remedies. Secondly, placing such a burden of proof on him ran counter to the approach taken by the CJEU in the *ASML* judgment, according to which 'it [was] 'possible' for a defendant to bring proceedings to challenge a default judgment against him only if he [was] in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given' (see paragraph 58 above). Thirdly, according to the information supplied by the Cypriot Government, the possibility of an appeal lodged out of time being allowed in Cyprus was highly speculative and was a matter for the court's discretion (see paragraph 68 above). Moreover, since the Riga Regional Court judgment of 2 October 2006 refusing to declare the judgment enforceable had been in his favour (see paragraph 32 above), the applicant had had no reason to attempt to lodge an appeal in Cyprus at that point.

78. In view of all the above considerations the applicant submitted that, in declaring the Cypriot judgment enforceable and refusing to examine his argument that he had not been duly notified of the examination of the case by the Cypriot court, the Latvian courts had failed to ob-

serve the guarantees of a fair hearing, in breach of Article 6 § 1 of the Convention.

79. Lastly — still from the standpoint of Article 6 § 1 — the applicant criticised the way in which the hearing of 31 January 2007 before the Senate of the Supreme Court had been conducted. He complained in particular that the principle of equality of arms had not been respected and that the Senate had refused to provide him with a copy of the record of the hearing.

2. The respondent Government

80. Unlike the applicant, the respondent Government were of the view that the *Bosphorus* presumption applied in the present case. Firstly, they submitted that the grounds for non-recognition provided for in Article 34(2) of the Brussels I Regulation could not be interpreted as granting the court in the Member State in which enforcement was sought a margin of discretion, as the grounds for refusing recognition were clearly set out in the text of that Article. Referring to the explanatory memorandum concerning the proposal for a Regulation (see paragraph 56 above) and to the CJEU's judgment in the case of *Apostolides v. Orams* (see paragraph 60 above), the respondent Government submitted that the legal form of a regulation had been expressly chosen by the European Union institutions in order not to leave any discretion to the Member States. The provisions of the Regulation were autonomous and could not be interpreted or applied in the light of domestic law, and Article 34 had to be interpreted strictly since it constituted an obstacle to the attainment of one of the fundamental objectives of the Regulation as a whole. Furthermore, the court with jurisdiction to rule on the enforcement of the judgment in the Member State in question did not have any authority to review the possible grounds for non-enforcement on its own initiative. Consequently, the Senate of the Supreme Court had not enjoyed any discretion in deciding to recognise and enforce the Limassol District Court judgment. In so doing, it had simply complied with its strict obligations arising out of Latvia's membership of the European Union.

81. Secondly, the respondent Government asserted that the sole fact that the Senate of the Supreme Court had not made full use of the review mechanism provided for by EU law did not result in the rebuttal of the *Bosphorus* presumption. In their submission, the application of that presumption could not be made subject to a requirement for the domestic courts to request a preliminary ruling from the CJEU in all cases without exception, as this would run counter to the spirit of cooperation that must govern relations between the domestic courts and the CJEU. The domestic courts referred a question for a preliminary ruling only where they had doubts as to the correct interpretation or application of EU legislation. They were not required to do so if they found that the question raised was not relevant, that the provision in question had already been interpreted by the CJEU or that the correct application of EU law was so obvious as to leave no scope for reasonable doubt. That was precisely the situation in the present case, as the CJEU's existing case-law had been sufficiently explicit with regard to the meaning and scope of the requirements of Article 34(2) of the Brussels I Regulation. Moreover, if the applicant had considered it necessary to obtain clarifications on that provision, he could have asked the Senate of the Supreme Court to refer the matter to the CJEU for a preliminary ruling. The fact that he had not done so was an indication that he had considered such a move to serve no purpose.

82. The respondent Government added that, in rejecting the applicant's argument that he had not been duly informed of the proceedings on the sole ground that he had not challenged the Cypriot judgment, the Senate of the Latvian Supreme Court had acted in full conformity with Article 34(2) of the Brussels I Regulation as interpreted by the CJEU. The applicant had at no point alleged, still less proved, before the domestic courts or the Strasbourg Court that he had at least attempted to institute appeal proceedings in Cyprus. Moreover, it was reasonable to consider that in view of the six-month period that had elapsed between June 2006 (when the applicant had been apprised of the content of the Cypriot judgment) and January 2007 (when the Senate of the Supreme Court had examined the case), the applicant had had sufficient time to lodge an appeal in Cyprus. On that point the respondent Government referred to the Cypriot Government's observations, from which it was clear that such a remedy had been available in theory and in practice and had not been subject to a strict time-limit (see paragraph 68 above). They submitted that Article 34(2) of the Brussels I Regulation was based on the premise that any defects in a judgment given in default should be remedied in the country of origin. If the applicant had lodged an appeal with the Cypriot courts, the Latvian Supreme Court could have stayed or adjourned the enforcement proceedings in accordance with Articles 37(1) and 46(1) of the Regulation. In omitting, without any real justification, to lodge such an appeal, the applicant had effectively prevented the Latvian courts from refusing enforcement of the judgment.

83. Observing that the applicant had been an investment consultant, the respondent Go-

vernment further submitted that he should have known that failure to repay his debt would result in proceedings in the Cypriot courts and that the summons would be sent to the address indicated in the acknowledgment of debt deed. As the applicant had not provided his true address to the company with which he had entered into the loan agreement, his conduct might possibly be characterised as an abuse of rights for the purposes of Article 17 of the Convention. Furthermore, given that the applicant had consented to the application of Cypriot law, he must be assumed to have been very familiar with the legal system in Cyprus, including the available remedies. Consequently, his argument that the Cypriot judgment had contained no references to the available judicial remedies lacked any relevance, bearing in mind that neither the Brussels I Regulation, nor Cypriot law, nor Article 6 § 1 of the Convention required the courts to insert such a reference in their judgments. Hence, the situation of which the applicant complained before the Court had resulted essentially from his own conduct.

84. The respondent Government submitted that one of the European Union's objectives was to secure the effective functioning of the common market. Attainment of and compliance with that objective, and mutual trust in the administration of justice, constituted a general interest sufficient to justify certain restrictions on the right to a fair hearing, especially since the fairness of proceedings was also a fundamental principle of EU law recognised by the CJEU. Hence, the system established by the Brussels I Regulation respected the right to a fair hearing. Accordingly, and in the light of the *Bosphorus* presumption, the respondent Government requested the Court to find that the Senate of the Supreme Court had taken sufficient account of the applicant's rights under Article 6 § 1 of the Convention.

85. Lastly, the respondent Government rejected the applicant's claims that the hearing of 31 January 2007 had been conducted unfairly. In their submission, it was clear from the Supreme Court judgment that the applicant's lawyer had had an opportunity to make oral pleadings at the hearing. The reason why no record had been drawn up was that this was not required under domestic law in such a case. Furthermore, Article 6 § 1 did not require the domestic courts to produce a written record of every hearing.

C. Observations of the third-party interveners

1. The Estonian Government

86. The Estonian Government explained the ratio *legis* behind Article 34 of the Brussels I Regulation (as applicable at the material time). This Article had been very carefully drafted and struck a balance between respect for the rights of the defence and the need to ensure, by simplifying the formalities, rapid and straightforward recognition and enforcement in each Member State of judgments in civil and commercial matters emanating from another Member State. The manner in which the provision in question was drafted left no discretion to the courts in the Member State in which enforcement was sought, especially since the abundant and clear case-law of the CJEU provided them with precise guidelines as to its application. For that reason, the application of the *Bosphorus* presumption was not subject to a requirement for the courts of the Member States systematically to request a preliminary ruling from the CJEU whenever Article 34(2) of the Brussels I Regulation was applicable.

87. The Estonian Government attached considerable weight to the fact that the two States concerned, Cyprus and Latvia, were Parties to the Convention and subject to the Court's jurisdiction. Accordingly, unlike in cases where the judgment to be enforced emanated from a third country, the court from which the declaration of enforceability was sought did not have to satisfy itself that the proceedings in the State of origin had generally conformed to the requirements of Article 6 § 1 of the Convention. Its review should be confined to the formalities of the enforcement proceedings, as it remained open to the defendant to assert his or her Article 6 § 1 rights in the courts of the State of origin.

88. In the Estonian Government's submission, where defendants against whom judgment had been given in default did not lodge an appeal against the judgment in question in the State of origin after they had been made aware of it, and failed to demonstrate that such a remedy would be impossible or ineffective, the court in the State in which enforcement was sought had no discretion, in examining an appeal in the context of the enforcement proceedings, to refuse the other party's request for recognition and enforcement. In view of the overall rationale behind Article 34(2) of the Brussels I Regulation and the general principles of civil procedure, it was reasonable for the burden of proof in that regard to be placed on the defendant. Article 34(2) of the Brussels I Regulation afforded individuals a standard of protection equivalent to that provided by Article 6 § 1 of the Convention for the purposes of the *Bosphorus* case-law, and thus required the State addressed to enforce the judgment as swiftly as possible.

2. The European Commission

89. The European Commission submitted that the presumption of equivalent protection, known as the *Bosphorus* presumption, was applicable in the present case. It confirmed that under Article 45(1) of the Brussels I Regulation the court in which the declaration of enforceability was requested could refuse the request only on one of the grounds set forth in Articles 34 and 35 of the Regulation. Hence, the courts of the Member States could not exercise any discretion in ordering the enforcement of a judgment given in another Member State. Such an act fell strictly within the scope of the international legal obligations of the Member State in which enforcement was sought, arising out of its membership of the European Union.

90. As to the fact that in the present case, as in the case of *Michaud* (cited above), the domestic courts had not sought a preliminary ruling from the CJEU, the European Commission submitted that there was nevertheless one significant difference between the two cases. In this case, unlike in *Michaud*, it could not be said that the 'full potential of the [preliminary ruling] procedure' had not been deployed, given that the applicant had not asked the courts in the respondent State to refer the question for a preliminary ruling or even raised any doubts as to the compatibility of the relevant provisions of European Union law with the Convention right whose violation he now alleged before the Court. The Commission further noted that a request for a preliminary ruling did not constitute a remedy to be exhausted for the purposes of Article 35 § 1 of the Convention. In general terms, the Commission submitted that the application of the *Bosphorus* presumption could not be made subject to a requirement for the courts of the EU Member States to seek a preliminary ruling from the CJEU whenever they were called on to apply the provisions of EU law. Even assuming that EU law imposed an obligation on the domestic court concerned to seek a preliminary ruling, failure to comply with that obligation should not be 'penalised' by a refusal on the part of the European Court of Human Rights to apply the presumption of equivalent protection.

91. In the European Commission's view, the recognition and enforcement machinery established by the Brussels I Regulation was compatible in itself with the right to a fair hearing protected by Article 6 § 1 of the Convention. Article 34(2) of the Regulation had to be read together with the other relevant provisions of the Regulation and with the Regulations on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (see paragraph 66 above). The combined effect of those provisions meant that the right to a fair hearing was guaranteed not only during the stage of recognition and enforcement of a judgment but also earlier, at the stage of the court proceedings in the Member State of origin. Recognition and enforcement did not depend on whether the document instituting the proceedings had been served in accordance with the formal requirements, but rather on a specific examination of whether the defendant's right to adversarial process had in fact been respected. The Commission further observed that Article 34 (1) of the Regulation provided for recognition and enforcement to be refused where 'recognition [was] manifestly contrary to public policy in the Member State in which recognition [was] sought'. In the Commission's view, this provision afforded an even greater degree of protection of fundamental rights as it did not require an appeal to be lodged in the State of origin.

92. The Commission submitted that in interpreting the conditions laid down in Article 34(2) of the Brussels I Regulation, the CJEU had been concerned to protect the right of defendants in default of appearance to a fair hearing. In particular, in its judgment in *ASML* (cited at paragraph 58 above), it had held that a defendant in default of appearance could be deemed to have been in a position to bring proceedings to challenge a judgment given against him only if he was in fact acquainted with its contents, which presupposed that it had been served on him. Simply being aware of the existence of a judgment was not sufficient in that regard. Hence, the existence or otherwise of remedies in the country of origin had to be assessed with reference to the point at which the defendant had actually been apprised of the content of the judgment as distinct from merely learning of its existence. It was true that Article 43 of the Brussels I Regulation did not require the court in which the declaration of enforceability was requested to automatically examine whether the circumstances enumerated in Article 34(2) applied, including the possibility of lodging an appeal in the State of origin. However, in the Commission's view, this had no bearing on compliance with Article 6 § 1 of the Convention, since in principle neither that provision nor European Union law governed the admissibility of evidence and its assessment by the domestic courts.

93. In sum, the European Commission submitted that, far from providing for 'automatic' recognition and enforcement of judgments given in another Member State, the Brussels I Regulation made recognition and enforcement contingent on respect for the right to adversarial process and hence for the right to a fair hearing within the meaning of Article 6 § 1 of the Convention.

3. The AIRE Centre

94. The AIRE Centre stressed the need to safeguard the right to a fair hearing in the context of the procedure for the recognition and enforcement of judgments within the European Union, and the duty of the domestic courts to secure that right. A court hearing an appeal against the recognition and enforcement of a foreign judgment could not confine its attention to verifying compliance with the formal requirements of Article 34(2) of the Brussels I Regulation or (after 10 June 2015) those of Article 45(1)(a) of the Brussels I *bis* Regulation. On the contrary, where the rights of the defence had been breached in the State of origin, the court could and should make use of Article 34(1) of the Brussels I Regulation or Article 45(1) of the Brussels I bis Regulation, according to which the request for recognition and enforcement had to be refused if 'recognition [was] manifestly contrary to public policy in the Member State in which recognition [was] sought'. In the AIRE Centre's submission, if the court failed to do so it would be committing a manifest error of interpretation of European Union law. In other words, the court hearing the appeal had discretion to refuse enforcement of the judgment if it had been given in breach of the rights of the defence.

95. The AIRE Centre further submitted that the Court should review its current approach to the *Bosphorus* presumption, especially in the light of the stance adopted by the CJEU in the *Melloni* judgment and in Opinion 2/13 (see paragraphs 47 and 49 above). It maintained in particular that the conclusions of Opinion 2/13, and especially of paragraph 192, were radically at odds with protection of the human rights guaranteed by the Convention.

D. The Court's assessment

1. Preliminary considerations

96. The Court reiterates at the outset that, as regards disputes whose outcome is decisive for civil rights, Article 6 § 1 of the Convention is applicable to the execution of foreign final judgments (see *McDonald v. France* (dec.), no. 18648/04, 29 April 2008; *Saccoccia v. Austria*, no. 69917/01, § 60–62, 18 December 2008; and *Sholokhov v. Armenia and the Republic of Moldova*, no. 40358/05, § 66, 31 July 2012). It is not disputed that the Limassol District Court judgment of 24 May 2004, ordering the applicant to pay a contractual debt together with the corresponding interest and the costs and expenses in respect of the proceedings, concerned the substance of a 'civil' obligation on the part of the applicant. Article 6 § 1 is therefore applicable in the present case.

97. The judgment of 24 May 2004 was given by a Cypriot court and the Latvian courts ordered its enforcement in Latvia. Consequently, the applicant's complaints under Article 6 of the Convention as set out in his application concerned both the Cypriot proceedings and those in Latvia. With regard to the former, the applicant complained that his defence rights had been infringed, while in the case of the latter he complained that the courts had validated the proceedings in Cyprus by ordering the recognition and enforcement of the judgment. However, the Court declared the complaint against Cyprus inadmissible as being out of time (partial decision of 3 March 2010, see paragraph 4 above). At the present stage of the proceedings the application therefore concerns Latvia alone. Accordingly, the Court does not have jurisdiction *ratione personae* to give a formal ruling on whether the Limassol District Court complied with the requirements of Article 6 § 1. However, it must ascertain whether, in declaring the Cypriot judgment to be enforceable, the Latvian courts acted in accordance with that provision (see, *mutatis mutandis, Pellegrini v. Italy*, no. 30882/96, § 40–41, ECHR 2001-VIII). In doing so the Court cannot but have regard to the relevant aspects of the proceedings in Cyprus.

98. The Court considers that a decision to enforce a foreign judgment cannot be regarded as compatible with the requirements of Article 6 § 1 of the Convention if it was taken without the unsuccessful party having been afforded any opportunity of effectively asserting a complaint as to the unfairness of the proceedings leading to that judgment, either in the State of origin or in the State addressed. In their third-party submissions the Estonian Government stressed the importance of the distinction between the enforcement of a judgment emanating from another Contracting Party to the Convention and that of a judgment given by the authorities of a State that was not a Party to the Convention. In the first case, where there was a presumption that the parties could secure protection of their Convention rights in the country of origin of the judgment, the review by the court in the State addressed should be more limited than in the second case (see paragraph 87 above). The Court notes that it has never previously been called upon to examine observance of the guarantees of a fair hearing in the context of mutual recognition based on European Union law. However, it has always applied the general principle whereby a court examining a request for recognition and enforcement of a foreign judgment cannot grant the request without first conducting some measure of review of that judgment in the light of the guarantees of a fair hearing; the intensity of that review may vary

depending on the nature of the case (see, *mutatis mutandis, Drozd and Janousek v. France and Spain*, 26 June 1992, § 110, Series A no. 240, and *Pellegrini,* cited above, § 40). In the present case the Court must therefore determine, in the light of the relevant circumstances of the case, whether the review conducted by the Senate of the Latvian Supreme Court was sufficient for the purposes of Article 6 § 1.

99. The Court emphasises that, in accordance with Article 19 of the Convention, its sole duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly made by a national court in assessing the evidence before it, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, among many other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). The Court cannot itself assess the facts which have led a national court to adopt one decision rather than another; otherwise, it would be acting as a court of fourth instance and would disregard the limits imposed on its action (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 197, ECHR 2012). Accordingly, it does not have jurisdiction to rule on issues of fact raised before it such as the applicant's claim that he had repaid his debt before the proceedings were instituted against him (see paragraphs 15 and 77 above).

100. The Court further notes that the recognition and enforcement of the Cypriot judgment took place in accordance with Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as the Brussels I Regulation), which was applicable at the relevant time. The applicant alleged that the Senate of the Supreme Court had breached Article 34(2) of that Regulation and the corresponding provision of the Latvian Civil Procedure Law. The Court reiterates that it is not competent to rule formally on compliance with domestic law, other international treaties or European Union law (see, for example, *S.J. v. Luxembourg*, no. 34471/04, § 52, 4 March 2008, and *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 110, 3 October 2014). The task of interpreting and applying the provisions of the Brussels I Regulation falls firstly to the CJEU, in the context of a request for a preliminary ruling, and secondly to the domestic courts in their capacity as courts of the Union, that is to say, when they give effect to the Regulation as interpreted by the CJEU. The jurisdiction of the European Court of Human Rights is limited to reviewing compliance with the requirements of the Convention, in this case with Article 6 § 1. Consequently, in the absence of any arbitrariness which would in itself raise an issue under Article 6 § 1, it is not for the Court to make a judgment as to whether the Senate of the Latvian Supreme Court correctly applied Article 34(2) of the Brussels I Regulation or any other provision of European Union law.

2. The presumption of equivalent protection (the Bosphorus presumption)

(a) Scope of the presumption of equivalent protection

101. The Court reiterates that, even when applying European Union law, the Contracting States remain bound by the obligations they freely entered into on acceding to the Convention. However, those obligations must be assessed in the light of the presumption established by the Court in the *Bosphorus* judgment and developed in *Michaud* (both cited above; see also *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 338, ECHR 2011, and Povse, cited above, § 76). In *Michaud*, the Court summarised its case-law on this presumption in the following terms:

> "102. The Court reiterates that absolving the Contracting States completely from their Convention responsibility where they were simply complying with their obligations as members of an international organisation to which they had transferred a part of their sovereignty would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards. In other words, the States remain responsible under the Convention for the measures they take to comply with their international legal obligations, even when those obligations stem from their membership of an international organisation to which they have transferred part of their sovereignty (see *Bosphorus*, cited above, § 154).
>
> 103. It is true, however, that the Court has also held that action taken in compliance with such obligations is justified where the relevant organisation protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent — that is to say not identical but 'comparable' — to that for which the Convention provides (it being understood that any such finding of 'equivalence' could not be final and would be susceptible to review in the light of any relevant change in fun-

damental rights protection). If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.
However, a State will be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it has exercised State discretion (see *M.S.S. v. Belgium and Greece*, cited above, § 338). In addition, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights (see *Bosphorus*, cited above, § 152-58, and also, among other authorities, *M.S.S. v. Belgium and Greece*, cited above, § 338-40).
104. This presumption of equivalent protection is intended, in particular, to ensure that a State Party is not faced with a dilemma when it is obliged to rely on the legal obligations incumbent on it as a result of its membership of an international organisation which is not party to the Convention and to which it has transferred part of its sovereignty, in order to justify its actions or omissions arising from such membership *vis-à-vis* the Convention. It also serves to determine in which cases the Court may, in the interests of international cooperation, reduce the intensity of its supervisory role, as conferred on it by Article 19 of the Convention, with regard to observance by the States Parties of their engagements arising from the Convention. It follows from these aims that the Court will accept such an arrangement only where the rights and safeguards it protects are given protection comparable to that afforded by the Court itself. Failing that, the State would escape all international review of the compatibility of its actions with its Convention commitments."

102. In the context of the former 'first pillar' of the EU (see *Bosphorus*, cited above, § 72), the Court held that the protection of fundamental rights afforded by the legal system of the European Union was in principle equivalent to that for which the Convention provided. In arriving at that conclusion it found, firstly, that the European Union offered equivalent protection of the substantive guarantees, observing in that connection that at the relevant time respect for fundamental rights had already been a condition of the lawfulness of Community acts and that the CJEU referred extensively to Convention provisions and to Strasbourg case-law in carrying out its assessment (see *Bosphorus*, cited above, § 159). This finding has applied *a fortiori* since 1 December 2009, the date of entry into force of Article 6 (amended) of the Treaty on European Union, which confers on the Charter of Fundamental Rights of the European Union the same value as the Treaties and gives fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, the status of general principles of European Union law (see *Michaud*, cited above, § 106).
103. The Court found the substantive protection afforded by EU law to be equivalent taking into account the provisions of Article 52(3) of the Charter of Fundamental Rights, according to which, in so far as the rights contained in the Charter correspond to rights guaranteed by the Convention, their meaning and scope are the same, without prejudice to the possibility for EU law to provide more extensive protection (see *Bosphorus*, cited above, § 80). In examining whether, in the case before it, it can still consider that the protection afforded by EU law is equivalent to that for which the Convention provides, the Court is especially mindful of the importance of compliance with the rule laid down in Article 52(3) of the Charter of Fundamental Rights given that the entry into force of the Treaty of Lisbon (see paragraph 37 above) conferred on the Charter the same legal value as the Treaties.
104. Secondly, the Court has recognised that the mechanism provided for by European Union law for supervising observance of fundamental rights, in so far as its full potential has been deployed, also affords protection comparable to that for which the Convention provides. On this point, the Court has attached considerable importance to the role and powers of the CJEU, despite the fact that individual access to that court is far more limited than access to the Strasbourg Court under Article 34 of the Convention (see the judgments in *Bosphorus*, § 160-65, and *Michaud*, § 106-11, both cited above).

(b) Application of the presumption of equivalent protection in the present case

105. The Court reiterates that the application of the presumption of equivalent protection in the legal system of the European Union is subject to two conditions, which it set forth in the *Michaud* judgment, cited above. These are the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by European Union law (ibid., § 113-

15). The Court must therefore ascertain whether these two conditions were satisfied in the present case.

106. With regard to the first condition, the Court notes at the outset that the provision to which the Senate of the Supreme Court gave effect was contained in a Regulation, which was directly applicable in the Member States in its entirety, and not in a Directive, which would have been binding on the State with regard to the result to be achieved but would have left it to the State to choose the means and manner of achieving it (see, conversely, *Michaud*, cited above, § 113). As to the precise provision applied in the instant case, namely Article 34(2) of the Brussels I Regulation, the Court notes that it allowed the refusal of recognition or enforcement of a foreign judgment only within very precise limits and subject to certain preconditions, namely that 'the defendant [had] not [been] served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant [had] failed to commence proceedings to challenge the judgment when it [had been] possible for him to do so'. It is clear from the interpretation given by the CJEU in a fairly extensive body of case-law (see paragraphs 57–61 above) that this provision did not confer any discretion on the court from which the declaration of enforceability was sought. The Court therefore concludes that the Senate of the Latvian Supreme Court did not enjoy any margin of manoeuvre in this case.

107. The present case is therefore distinguishable from that of *M.S.S.*, cited above. In that case, in examining the issue of Belgium's responsibility under the Convention, the Court noted that, under the terms of the applicable Regulation (the Dublin II Regulation), the Belgian State authorities retained the discretionary power to decide whether or not to make use of the 'sovereignty' clause which allowed them to examine the asylum application and to refrain from sending the applicant back to Greece if they considered that the Greek authorities were likely not to fulfil their obligations under the Convention (§ 339-40). By contrast, Article 34(2) of the Brussels I Regulation did not grant States any such discretionary powers of assessment.

108. In its third-party submissions the AIRE Centre argued that the Senate of the Latvian Supreme Court could and should have had recourse to Article 34(1) of the Brussels I Regulation, according to which the request for a declaration of enforceability had to be refused if 'recognition [was] manifestly contrary to public policy in the Member State in which recognition [was] sought'. According to the AIRE Centre this provision allowed the Latvian court a degree of discretion (see paragraph 94 above). However, the arguments raised by the applicant before the Supreme Court were confined to the application of paragraph 2 of Article 34. The Court will therefore confine its analysis to the applicant's complaints as raised before the Supreme Court and in the context of the present proceedings. It considers that it is not its task to determine whether another provision of the Brussels I Regulation should have been applied.

109. As regards the second condition, namely the deployment of the full potential of the supervisory mechanism provided for by European Union law, the Court observes at the outset that in the *Bosphorus* judgment, cited above, it recognised that, taken overall, the supervisory mechanisms put in place within the European Union afforded a level of protection equivalent to that for which the Convention mechanism provided (ibid., § 160-64). Turning to the specific circumstances of the present case, it notes that the Senate of the Supreme Court did not request a preliminary ruling from the CJEU regarding the interpretation and application of Article 34(2) of the Regulation. However, it considers that this second condition should be applied without excessive formalism and taking into account the specific features of the supervisory mechanism in question. It considers that it would serve no useful purpose to make the implementation of the *Bosphorus* presumption subject to a requirement for the domestic court to request a ruling from the CJEU in all cases without exception, including those cases where no genuine and serious issue arises with regard to the protection of fundamental rights by EU law, or those in which the CJEU has already stated precisely how the applicable provisions of EU law should be interpreted in a manner compatible with fundamental rights.

110. The Court observes that, in a different context, it has held that national courts against whose decisions no judicial remedy exists in national law are obliged to give reasons for refusing to refer a question to the CJEU for a preliminary ruling, in the light of the exceptions provided for by the case-law of the CJEU. The national courts must therefore state the reasons why they consider it unnecessary to seek a preliminary ruling (see *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, § 62, 20 September 2011, and *Dhahbi v. Italy*, no. 17120/09, § 31–34, 8 April 2014). The Court emphasises that the purpose of the review it conducts in this regard is to ascertain whether the refusal to refer a question for a preliminary ruling constituted in itself a violation of Article 6 § 1 of the Convention; in so

doing, it takes into account the approach already established by the case-law of the CJEU. This review therefore differs from that which it conducts when, as in the present case, it examines the decision not to request a preliminary ruling as part of its overall assessment of the degree of protection of fundamental rights afforded by European Union law. The Court carries out this assessment, in line with the case-law established in *Michaud*, in order to determine whether it can apply the presumption of equivalent protection to the decision complained of, a presumption which the Court applies in accordance with conditions which it has itself laid down.

111. The Court thus considers that the question whether the full potential of the supervisory mechanisms provided for by European Union law was deployed — and, more specifically, whether the fact that the domestic court hearing the case did not request a preliminary ruling from the CJEU is apt to preclude the application of the presumption of equivalent protection — should be assessed in the light of the specific circumstances of each case. In the present case it notes that the applicant did not advance any specific argument concerning the interpretation of Article 34(2) of the Brussels I Regulation and its compatibility with fundamental rights such as to warrant a finding that a preliminary ruling should have been requested from the CJEU. This position is confirmed by the fact that the applicant did not submit any request to that effect to the Senate of the Latvian Supreme Court. The present case is thus clearly distinguishable from *Michaud*, cited above, in which the national supreme court refused the applicant's request to seek a preliminary ruling from the CJEU even though the issue of the Convention compatibility of the impugned provision of European Union law had never previously been examined by the CJEU (ibid., § 114). Hence, the fact that the matter was not referred for a preliminary ruling is not a decisive factor in the present case. The second condition for application of the *Bosphorus* presumption should therefore be considered to be satisfied.

112. In view of the foregoing considerations, the Court concludes that the presumption of equivalent protection is applicable in the present case, as the Senate of the Supreme Court did no more than implement Latvia's legal obligations arising out of its membership of the European Union (see, *mutatis mutandis, Povse*, cited above, § 78). Accordingly, the Court's task is confined to ascertaining whether the protection of the rights guaranteed by the Convention was manifestly deficient in the present case such that this presumption is rebutted. In that case, the interest of international cooperation would be outweighed by observance of the Convention as a 'constitutional instrument of European public order' in the field of human rights (see *Bosphorus*, § 156, and *Michaud*, § 103, both cited above). In examining this issue the Court must have regard both to Article 34(2) of the Brussels I Regulation as such and to the specific circumstances in which it was implemented in the present case.

3. Allegation that the protection of the rights guaranteed by the Convention was manifestly deficient

(a) General remarks on mutual recognition

113. In general terms, the Court observes that the Brussels I Regulation is based in part on mutual recognition mechanisms which themselves are founded on the principle of mutual trust between the Member States of the European Union. The Preamble to the Brussels I Regulation states that the approach underpinning the Regulation is one of 'mutual trust in the administration of justice' within the EU, which implies that 'the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation' (see paragraph 54 above). The Court is mindful of the importance of the mutual recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require. As stated in Articles 81(1) and 82(1) of the TFEU, the mutual recognition of judgments is designed in particular to facilitate effective judicial cooperation in civil and criminal matters. The Court has repeatedly asserted its commitment to international and European cooperation (see, among other authorities, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 63 and 72, ECHR 1999-I, and *Bosphorus*, cited above, § 150). Hence, it considers the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention.

114. Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms, as indeed confirmed by Article 67(1) of the TFEU. However, it is apparent that the aim of effectiveness pursued by some of the methods used results in the review of the observance of fundamental rights being tightly regulated or even limited. Hence, the CJEU stated recently in Opinion 2/13 that 'when implementing EU law, the Member States may, under EU law, be re-

quired to presume that fundamental rights have been observed by the other Member States, so that …, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU' (see paragraph 49 above). Limiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient.

115. Moreover, the Court observes that where the domestic authorities give effect to European Union law and have no discretion in that regard, the presumption of equivalent protection set forth in the *Bosphorus* judgment is applicable. This is the case where the mutual recognition mechanisms require the court to presume that the observance of fundamental rights by another Member State has been sufficient. The domestic court is thus deprived of its discretion in the matter, leading to automatic application of the *Bosphorus* presumption of equivalence. The Court emphasises that this results, paradoxically, in a twofold limitation of the domestic court's review of the observance of fundamental rights, due to the combined effect of the presumption on which mutual recognition is founded and the *Bosphorus* presumption of equivalent protection.

116. In the *Bosphorus* judgment the Court reiterated that the Convention is a 'constitutional instrument of European public order' (ibid., § 156). Accordingly, the Court must satisfy itself, where the conditions for application of the presumption of equivalent protection are met (see paragraphs 105–106 above), that the mutual recognition mechanisms do not leave any gap or particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient. In doing so it takes into account, in a spirit of complementarity, the manner in which these mechanisms operate and in particular the aim of effectiveness which they pursue. Nevertheless, it must verify that the principle of mutual recognition is not applied automatically and mechanically (see, *mutatis mutandis, X v. Latvia* [GC], no. 27853/09, § 98 and 107, ECHR 2013) to the detriment of fundamental rights — which, the CJEU has also stressed, must be observed in this context (see, for instance, its judgment in *Alpha Bank Cyprus Ltd*, cited at paragraph 48 above). In this spirit, where the courts of a State which is both a Contracting Party to the Convention and a Member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law.

(b) Whether the protection of fundamental rights was manifestly deficient in the present case

117. The Court must now seek to ascertain whether the protection of fundamental rights afforded by the Senate of the Latvian Supreme Court was manifestly deficient in the present case such that the presumption of equivalent protection is rebutted, as regards both the provision of European Union law that was applied and its implementation in the specific case of the applicant.

118. The Court considers that the requirement to exhaust remedies arising from the mechanism provided for by Article 34(2) of the Brussels I Regulation as interpreted by the CJEU (the defendant must have made use of any remedies available in the State of origin in order to be able to complain of a failure to serve him with the document instituting the proceedings), is not in itself problematic in terms of the guarantees of Article 6 § 1 of the Convention. This is a precondition which pursues the aim of ensuring the proper administration of justice in a spirit of procedural economy and which is based on an approach similar to that underpinning the rule of exhaustion of domestic remedies set forth in Article 35 § 1 of the Convention. This approach comprises two strands. Firstly, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and, secondly, it is presumed that there is an effective remedy available in the domestic system in respect of the alleged breach (see, *mutatis mutandis, Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV, and *Sargsyan v. Azerbaijan* [GC], no. 40167/06, § 115, ECHR 2015). Hence, the Court sees no indication that the protection afforded was manifestly deficient in this regard.

119. However, the Court emphasises that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamen-

tal components of the concept of a 'fair hearing' within the meaning of Article 6 § 1 of the Convention. They require a 'fair balance' between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent or opponents (see, for example, *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 56, ECHR 2004-III). These principles, which cover all aspects of procedural law in the Contracting States, are also applicable in the specific sphere of service of judicial documents on the parties (see *Miholapa v. Latvia*, no. 61655/00, § 23, 31 May 2007, and *Övüş v. Turkey*, no. 42981/04, § 47, 13 October 2009), although Article 6 § 1 cannot be interpreted as prescribing a specific form of service of documents (see the decision in *Orams*, cited above).

120. Turning to the present case the Court notes that the applicant maintained, in particular, before the Latvian courts that he had not been duly notified in good time of the summons to appear before the Limassol District Court and the request by the company F.H. Ltd., with the result that he had been unable to arrange for his defence. He therefore argued that recognition of the impugned judgment should have been refused under Article 34(2) of the Brussels I Regulation. The applicant contended that the summons had been sent to an address where it had been physically impossible to reach him, even though the Cypriot and Latvian lawyers representing the claimant company had been perfectly aware of his business address in Riga and could easily have obtained his private address (see paragraph 30 above). He therefore raised cogent arguments in the Latvian courts alleging the existence of a procedural defect which, *a priori*, was contrary to Article 6 § 1 of the Convention and precluded the enforcement of the Cypriot judgment in Latvia.

121. In the light of the general principles reiterated above, the Court notes that, in the proceedings before the Senate of the Supreme Court, the applicant complained that he had not received any summons or been notified of the Cypriot judgment. In so doing he relied on the grounds for non-recognition provided for by Article 34(2) of the Brussels I Regulation. That provision states expressly that such grounds may be invoked only on condition that proceedings have previously been commenced to challenge the judgment in question, in so far as it was possible to do so. The fact that the applicant relied on that Article without having challenged the judgment as required necessarily raised the question of the availability of that legal remedy in Cyprus in the circumstances of the present case. In such a situation the Senate was not entitled simply to criticise the applicant, as it did in its judgment of 31 January 2007, for not appealing against the judgment concerned, and to remain silent on the issue of the burden of proof with regard to the existence and availability of a remedy in the State of origin; Article 6 § 1 of the Convention, like Article 34(2) *in fine* of the Brussels I Regulation, required it to verify that this condition was satisfied, in the absence of which it could not refuse to examine the applicant's complaint. The Court considers that the determination of the burden of proof, which, as the European Commission stressed (see paragraph 92 above), is not governed by European Union law, was therefore decisive in the present case. Hence, that point should have been examined in adversarial proceedings leading to reasoned findings. However, the Supreme Court tacitly presumed either that the burden of proof lay with the defendant or that such a remedy had in fact been available to the applicant. This approach, which reflects a literal and automatic application of Article 34(2) of the Brussels I Regulation, could in theory lead to a finding that the protection afforded was manifestly deficient such that the presumption of equivalent protection of the rights of the defence guaranteed by Article 6 § 1 is rebutted. Nevertheless, in the specific circumstances of the present application the Court does not consider this to be the case, although this shortcoming is regrettable.

122. It is clear, in fact, from the information provided by the Cypriot Government at the Grand Chamber's request, and not disputed by the parties, that Cypriot law afforded the applicant, after he had learned of the existence of the judgment, a perfectly realistic opportunity of appealing despite the length of time that had elapsed since the judgment had been given. In accordance with Cypriot legislation and case-law, where a defendant against whom a judgment has been given in default applies to have that judgment set aside and alleges, on arguable grounds, that he or she was not duly summoned before the court which gave judgment, the court hearing the application is required — and not merely empowered — to set aside the judgment given in default (see paragraph 68 above). Accordingly, the Court is not convinced by the applicant's argument that such a procedure would have been bound to fail. The Court has consistently held that if there is any doubt as to whether a given remedy offers a real chance of success, that point must be submitted to the domestic courts (see, for example, *Akdivar and Others*, cited above, § 71, and *Naydenov v. Bulgaria*, no. 17353/03, § 50, 26 November 2009). In the instant case the Court considers that, in the period between 16 June 2006 (the date on which he was given access to the entire case file at the

premises of the first-instance court and was able to acquaint himself with the content of the Cypriot judgment) and 31 January 2007 (the date of the hearing of the Senate of the Supreme Court), the applicant had sufficient time to pursue a remedy in the Cypriot courts. However, for reasons known only to himself, he made no attempt to do so.

123. The fact that the Cypriot judgment made no reference to the available remedies does not affect the Court's findings. It is true that section 230(1) of the Latvian Civil Procedure Law requires the courts to indicate in the text of their decisions the detailed arrangements and time-limits for appealing against them (see paragraph 67 above). However, while such a requirement is laudable in so far as it affords an additional safeguard which facilitates the exercise of litigants' rights, its existence cannot be inferred from Article 6 § 1 of the Convention (see *Société Guérin Automobiles v. the 15 States of the European Union* (dec.), no. 51717/99, 4 July 2000). It was therefore up to the applicant himself, if need be with appropriate advice, to enquire as to the remedies available in Cyprus after he became aware of the judgment in question.

124. On this point the Court shares the view of the respondent Government that the applicant, who was an investment consultant, should have been aware of the legal consequences of the acknowledgment of debt deed which he had signed. That deed was governed by Cypriot law, concerned a sum of money borrowed by the applicant from a Cypriot company and contained a clause conferring jurisdiction on the Cypriot courts. Accordingly, the applicant should have ensured that he was familiar with the manner in which possible proceedings would be conducted before the Cypriot courts (see, *mutatis mutandis, Robba v. Germany*, no. 20999/92, Commission decision of 28 February 1996, unpublished). Having omitted to obtain information on the subject he contributed to a large extent, as a result of his inaction and lack of diligence, to bringing about the situation of which he complained before the Court and which he could have prevented so as to avoid incurring any damage (see, *mutatis mutandis, Hussin v. Belgium* (dec.), no. 70807/01, 6 May 2004, and *McDonald,* cited above).

125. Hence, in the specific circumstances of the present case, the Court does not consider that the protection of fundamental rights was manifestly deficient such that the presumption of equivalent protection is rebutted.

126. Lastly, as regards the applicant's other complaints under Article 6 § 1, and in so far as it has jurisdiction to rule on them, the Court finds no appearance of a violation of the rights secured under that provision.

127. Accordingly, there has been no violation of Article 6 § 1.

For these reasons, the Court

Holds, by sixteen votes to one, that there has been no violation of Article 6 § 1 of the Convention.

Noot

1. Deze uitspraak brengt verdere verduidelijking en verfijning in de verhouding tussen het EU-recht en het EVRM. Meer specifiek met betrekking tot de situaties waarin het EU-recht lidstaten een bepaalde verplichting (zonder beleidsvrijheid) oplegt waartegen een betrokken partij opkomt met een beroep op het EVRM. Daarbij gaat het om zaken die zowel bij het EHRM als het Hof van Justitie van de EU terecht kunnen komen met het potentiële risico van tegenstrijdige rechtspraak. Dit gevaar had moeten worden bezworen met een toetreding van de EU tot het EVRM. Deze toetreding lijkt er vooralsnog echter niet van te komen als gevolg van een negatief advies van het HvJ EU (Opinion 2/13). Saillant daarin was onder meer dat het HvJ EU als een van de argumenten tegen toetreding naar voren bracht dat er situaties zijn waarin het EU-recht en dan met name de vier verkeersvrijheden moeten kunnen blijven prevaleren boven EVRM-rechten, in het bijzonder omdat er van uit moet worden gegaan dat andere EU-lidstaten in zaken van uitlevering of zoals in casu erkenning van rechterlijke uitspraken in beginsel fundamentele rechten respecteren (het systeem van wederzijdse erkenning). Het EHRM grijpt de hier opgenomen uitspraak aan om mede in het licht van dat argument de verhouding met het EU-recht nog een keer te (her)ijken. Centrale boodschap: er is genoeg ruimte voor wederzijds vertrouwen, maar nationale rechters moeten altijd kritisch blijven nagaan of er geen reden is aan te nemen dat in een concrete casus toch EVRM-rechten in het gedrang komen. Geen vrijbrief voor de toepassing van EU-recht dus maar wel voldoende praktische manoeuvreerruimte voor het systeem van de EU.

2. De verhouding tussen het EU-recht en het EVRM wordt — als bekend — geregeerd door de bekende Bosphorus-doctrine. Ten aanzien van de EU gaat het Hof er vanuit dat daarbinnen in beginsel een met het EVRM equivalente mensenrechtenbescherming aanwezig is om welke reden klachten tegen lidstaten van de EU, tevens partij bij het EVRM, over het optreden van deze organisatie dan wel lidstaten die zonder eigen beoordelingsmarge uitvoering geven aan

EU-handelingen tot nu toe steeds worden afgewezen. Alleen indien een klager evidente gebreken aannemelijk weet te maken in de EU-mensenrechtenbescherming lijkt er ruimte voor de nationale rechter en het EHRM voor een inhoudelijke beoordeling van het concrete geval (EHRM 30 juni 2005, *AB* 2006/273, m.nt. Barkhuysen & Van Emmerik (*Bosphorus t. Ierland*)). Voorwaarde voor het aannemen van gelijkwaardige bescherming lijkt wel dat het HvJ EU al een oordeel moet hebben gegeven over de vraag of de desbetreffende EU-handeling waaraan lidstaten uitvoering geven in overeenstemming is met de grondrechten. Dit betekent dat de nationale rechter zo nodig de zaak prejudicieel heeft verwezen (EHRM 6 december 2012, *NJ* 2014/55, m.nt. Myjer (*Michaud t. Frankrijk*)). Is er echter bij de uitvoering van een EU-handeling beoordelingsmarge voor de lidstaten dan zal het EHRM het gebruik daarvan op normale wijze toetsen. Zie in dit verband nader Barkhuysen & Widdershoven in: *AB Klassiek* 2016/39 en T. Barkhuysen & M.L. van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht. De betekenis van het EVRM en het EU-Grondrechtenhandvest*, Deventer 2017, p. 19.

3. Naar de hier opgenomen uitspraak is door onder meer Straatsburgse 'Court watchers' reikhalzend uitgezien, nu het de eerste keer was na de Luxemburgse afwijzing van (de toetreding tot) het EVRM, dat het EHRM zich kon uitspreken over de verhouding tussen het EU-recht en het EVRM. Uit de hier opgenomen uitspraak Avotins blijkt dat het Straatsburgse Hof onverkort vasthoudt aan de Bosphorus-presumptie, die onder twee voorwaarden van toepassing is: 1) de EU-lidstaat in kwestie heeft geen beoordelingsmarge ten aanzien van de tenuitvoerlegging van EU-recht; 2) het EU-toezichtmechanisme is ten volle benut (inclusief de mogelijkheid om een prejudicieel oordeel te vragen). Als aan deze voorwaarden is voldaan, gaat Straatsburg ervan uit dat er sprake is van een gelijkwaardige grondrechtenbescherming binnen het EU-systeem. Dit is alleen anders indien klager weet aan te tonen dat sprake is van ernstige gebreken bij deze bescherming, hetgeen het EHRM tot nu toe nooit heeft aangenomen (zie bijvoorbeeld ook EHRM 20 januari 2009, *AB* 2009/310, m.nt. Barkhuysen & Van Emmerik (*Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij t. Nederland*)).

4. In de hier opgenomen uitspraak voegt het Hof aan de genoemde Bosphorus-lijn toe dat de hiervoor genoemde tweede voorwaarde, inhoudende dat het EU-toezichtstelsel ten volle wordt benut, niet betekent dat er altijd een prejudiciële vraag moet worden gesteld. Deze eis moet volgens het Hof niet al te strikt worden toegepast, er moet geen sprake zijn van *excessive formalism*. In casu heeft de klager in Letland noch in Straatsburg de kwestie van interpretatie van de relevante EU-bepaling naar voren gebracht en heeft de Letse rechter terecht geen aanleiding gezien een prejudiciële vraag te stellen. Dat zou kunnen worden gezien als een nadere uitleg van de hiervoor genoemde uitspraak inzake *Michaud*.

5. De belangrijkste waarde van de hier opgenomen uitspraak zit echter in het signaal dat het EHRM aan zijn Luxemburgse collega afgeeft, namelijk dat het belangrijke EU-beginsel van wederzijds vertrouwen (in dit geval bij de wederzijdse erkenning van elkaars nationale vonnissen) in algemene zin door de beugel kan, maar dat dit er niet toe mag leiden dat de nationale rechter daarmee zonder meer aanneemt dat het wel goed zit met de grondrechtenbescherming. De nationale rechter zal zo nodig in lijn met de nog steeds recht overeind staande Bosphorus-doctrine moeten toetsen (althans als aan de twee hievoor genoemde voorwaarden is voldaan) of sprake is van manifeste gebreken in de bescherming van EVRM-rechten. Uiteindelijk zit dat in de hier opgenomen zaak wel goed, hoewel dat oordeel ook de andere kant op had kunnen uitvallen. Het lijkt er dan ook vooral op dat het EHRM richting de Luxemburgse collega even zijn tanden heeft willen laten zien als het erom gaat wie uiteindelijk in Europa het laatste woord heeft als het gaat om grondrechtenbescherming. Zie in dit verband ook de speech van EHRM-president Raimondi bij de Hoge Raad op 18 november 2016 (zie onder meer www.rechtspraak.nl), die tegelijkertijd ook constateert dat er bij de twee Europese Hoven de wil bestaat om tot normatieve harmonisatie te komen, zij het dat hij zich nog steeds een warm voorstander toont van de toetreding van de EU tot het EHRM. De toekomst zal uitwijzen hoe deze ontwikkelingen verder gaan maar onze verwachting is dat de beide hoven inhoudelijk verder naar elkaar toe zullen groeien als het gaat om grondrechtenbescherming, of er nu alsnog een toetreding zal plaatsvinden of niet. De rol op het terrein van grondrechtenbescherming van het Hof van Justitie zal de komende jaren naar verwachting groter worden, mede door de toenemende betekenis van het EU-Grondrechtenhandvest. Door de wederzijdse beïnvloeding zal er steeds meer een algemeen Europees grondrechtelijk acquis ontstaan (vgl. Barkhuysen & Van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht*, p. 151-152).

6. Deze uitspraak is ook verschenen in *EHRC* 2016/187, m.nt. Glas & Krommendijk onder *EHRC* 2016/183.

T. Barkhuysen en M.L. van Emmerik